

No. 05-405 SEP 27 1995

**In The
Supreme Court of the United States**

**BAYLESS "BO" ODELL WHEELER
AND DANIEL L. MOORE,**

Petitioners,

versus

B.L. DEVELOPMENT CORP.,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the proper standard for determining whether a Title VII claim of employment discrimination should be presented to a jury?
2. In a case based on state law, where the only applicable state law is dictum from the state's highest court, is a federal court required to follow that dictum?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Bayless ("Bo") Odell Wheeler, Petitioner;
2. Daniel J. Moore, Petitioner;
3. Jim Waide, Esq., Counsel for Petitioners;
4. Ron L. Woodruff, Esq., Counsel for Petitioners;
5. B.L. Development Corporation, Respondent;
6. John Dunbar, Esq., Counsel for Respondent; and
7. Walter Davis, Esq., Counsel for Respondent.

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OPINIONS BELOW

The unreported opinion of the District Court granting Respondent's Motion for Summary Judgment is attached as App. 16-25.

The United States Fifth Circuit's opinion affirming the grant of summary judgment is reported at 415 F.3d 399 (5th Cir. 2005) and is attached as App. 1-15.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on June 29, 2005, by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a)(1), which says: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, . . . because of such individual's race . . ."

STATEMENT OF THE CASE

Petitioners, Bayless "Bo" Odell Wheeler¹ and Daniel J. Moore,² are both white, retired Memphis, Tennessee police officers. Petitioners were fired from management positions by black executives of the Respondent, B.L. Development Corporation. The United States Court of Appeals for the Fifth Circuit determined that one may not present a race discrimination case to a jury unless he can demonstrate a "*prima facie*" case by proving either that he was replaced by a person of the opposite race or that a person of the opposite race was treated differently under "nearly identical" circumstances. Therefore, that court upheld the District Court's grant of summary judgment, which dismissed the Petitioners' claims of race discrimination.

FACTS

On October 5, 2001, Petitioners reported to Respondent's compliance officer that top executives of the Respondent were receiving kickbacks (up to \$125.00 per executive per month) in the form of free dry-cleaning services from one of the Respondent's vendors. 3:597.³

¹ Petitioner Wheeler worked for the Memphis Police Department from 1963 until 1996, retiring after 33 years with the rank of captain. 3:570.

² Petitioner Moore similarly worked for the Memphis Police Department, but for nine years, from 1970 until 1979. 3:570.

³ The record contains four volumes. For sake of brevity, citations to the record on appeal to the Fifth Circuit will be as follows: volume #: page #. There is also a supplemental record containing one volume. Citations to the supplemental record will be indicated as - Supp., volume #: page #.

Petitioners believed receipt of the free dry-cleaning services by the executives violated both state law and the Respondent's own internal policies against vendors' giving gratuities to Respondent's employees. 3:363, 3:633.

Petitioners swore that Respondent began a pattern of harassment against them immediately following their October 5, 2001 report of the kickback scheme. This harassment culminated in the Petitioners' terminations some three weeks later, on October 25, 2001. The reason Respondent gave for the terminations was improper removal of a tire-changing machine from company property, without authorization. 3:598-616. This reason was obvious pretext because the Grand Casino knew that the tire-changing machine had been loaned to a local car dealership in exchange for the car dealership's repairing the machine and also knew that the machine had been returned to the Grand over two months prior to the firing of Petitioners. Petitioners alleged that they complained about the kickback scheme, and Respondent used the lending of the tire-changing machine incident as a pretext to fire them. 3:221.

After Petitioners were fired, their job duties were immediately taken over by Richard Sims, an African-American Vice-President, who was one of three black executives who recommended the white Petitioners' termination. 3:609, 3:642. However, several months after Petitioners were fired, some of their job duties were assigned to white employees, pursuant to a reorganization. 3:943.

Petitioners produced evidence that about the same time Petitioners were being charged with removal of company assets without permission, Debra Byrd, a black

employee on the same managerial level as Petitioners, was found by an investigator to have also engaged in removal of company assets without permission, on two occasions. 3:944-46. On one of these occasions, Byrd removed company property in order to hide inventory. Further, black manager Byrd, unlike Petitioners, had a previous disciplinary record because she had been found to have created a hostile work environment for subordinates. Supp., 1:1. Nevertheless, Byrd was not fired.

The United States District Court for the Northern District of Mississippi granted summary judgment for Respondent, holding that since Petitioners were ultimately replaced by white persons they could not make a *prima facie* case of race discrimination. App. 21-22. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the race discrimination claim on similar grounds. It held that Petitioners could not establish a *prima facie* case, since they could not prove that they were ultimately replaced by black employees, App. 14, and since they could not prove black manager Byrd was in a "nearly identical" situation to Petitioners'. *Id.*

Additionally, the Fifth Circuit dismissed Petitioners' state law claims by refusing to follow dictum from the Mississippi Supreme Court as to Mississippi law. App. 6-11.

REASONS FOR GRANTING WRIT

I. CONTRARY TO OTHER CIRCUITS, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ADOPTED A MECHANICAL, EXCLUSIVE STANDARD FOR DETERMINING WHEN AN EMPLOYMENT DISCRIMINATION CASE CAN BE PRESENTED TO A JURY.

The Fifth Circuit determined a discharged white employee cannot make a *prima facie* case so as to present a jury issue on whether race discrimination has occurred unless he proves that either he was "replaced by non-white employees," App. 14, or that he was "treated . . . differently than other non-white similarly situated employees," *Id.*, under "'nearly identical' circumstances." App. 13 (emphasis added).

The Fifth Circuit's view that in order to present a *prima facie* case of race discrimination, the discharged employee must prove that his job was filled by a person of the opposite race is supported by precedents from the Fifth and Fourth Circuit. See *Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir. 1995) (plaintiff must prove "that after her discharge, the position she held was filled by someone not within her protected class"); and *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) ("[i]n order to make out a *prima facie* case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class"). However, this rigid, mechanical test is contrary to the majority of circuits. In fact, the Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits have adopted more flexible standards than the Fifth Circuit. See *Meiri v. Dacon*, 759 F.2d 989, 996 (2d Cir. 1985) (always requiring that one be replaced by someone outside of the protected